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IN THE

Supreme Court of the United States

HAROLD E. HILL, MARGARET R. AND WILLIAM F. McCRIGHT, JOHN J. McQUEEN, RITA J. MOSKOWITZ, AND BARBARA SANTEE,

Petitioners,

v.

THOMAS E. KEMP (CHAIRMAN, OKLAHOMA TAX COMMISSION), JERRY JOHNSON (VICE CHAIRMAN, OKLAHOMA TAX COMMISSION), CONNIE IRBY (SECRETARY-MEMBER, OKLAHOMA TAX COMMISSION), AND BRAD HENRY (GOVERNOR),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The overarching question presented by this petition is whether the Tax Injunction Act, 28 U.S.C. § 1341, divests federal courts of original jurisdiction over a challenge to a statutory scheme authorizing the sale by the state of special license plates to those motorists who choose to purchase them, where the scheme impermissibly discriminates against the expression of certain views on such plates.

Underlying this central question are two subsidiary questions of equal importance:

(1) Whether, for purposes of the Tax Injunction Act, the amount charged by the state and paid by those motorists who choose to purchase a special license plate is not a tax, as the lower courts held, but instead an alternative source of state revenue, such as a contractual debt between a buyer and a seller.

(2) Whether the Tax Injunction Act is not, as the lower courts held, a jurisdictional bar to petitioners' viewpoint discrimination claims where *(a)* petitioners do not challenge either the calculation of any motorist's tax liability or the validity of the amount charged for any particular special license plate, *(b)* petitioners wish to purchase a special license plate expressing their own views, and *(c)* petitioners' claims would exist even if special license plates were available to motorists free of charge.

PARTIES TO THE PROCEEDING

Petitioners are Harold E. Hill, Margaret R. and William F. McCright, John J. McQueen, Rita J. Moskowitz, and Barbara Santee, all plaintiffs-appellants in the proceedings below.

Respondents are Thomas E. Kemp, Jerry Johnson, Connie Irby (respectively, the Chairman, Vice-Chairman and Secretary-Member of the Oklahoma Tax Commission), and Brad Henry (Governor of the State of Oklahoma), all defendants-appellees in the proceedings below sued in their official capacities.

Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. ("ORC"), a plaintiff-appellant in the proceedings below), does not seek further review of any of the decisions issued below with respect to its claims, which are distinct and severable from petitioners' claims. ORC's claims, unlike petitioners' claims, were also asserted against Howard H. Hendrick (Director of the Oklahoma Department of Human Services), W.A. "Drew" Edmondson (Oklahoma Attorney General), and Scott Meacham (Oklahoma Treasurer). These three individuals, who were each sued in their official capacities by ORC, are also not petitioners before this Court.[1]

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No petitioner is a corporation.

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[1] The district court substituted Defendant Meacham for Robert Butkin pursuant to Fed. R. Civ. P. 25(d)(1).

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OPINIONS BELOW

The opinion of the court of appeals is reported at 478 F.3d 1236 (10th Cir. 2007) and reproduced as Appendix A (1a-53a). The unpublished opinion and order of the district court, No. 04-CV-0028 (N.D. Okl. Aug. 16, 2005), is reproduced as Appendix B (54a-71a).

JURISDICTION

The court of appeals entered judgment on March 6, 2007, and a timely-filed petition for rehearing and rehearing en banc was denied on April 2, 2007. App. C, 72a-73a. On June 14, 2007, Justice Breyer extended the time within which to file a petition for *certiorari* to and including August 30, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act, 28 U.S.C. § 1341, provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." App. D, 74a.

The challenged statutory scheme, 47 Okla. Stat. §§ 1135.1 through 1135.8, is reproduced as Appendix E (75a-140a.[2] Other relevant provisions referenced in the statutory scheme are reproduced as Appendix F (141a-168a).

STATEMENT OF THE CASE

Petitioners challenge a statutory scheme authorizing the sale of special license plates by the Oklahoma Tax Commission to those Oklahoma motorists who choose to purchase them. Through the scheme, the Oklahoma legislature created actual

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[2] Petitioners do not include 47 Okla Stat. §§ 1135.1(B)(3) (App. E, 79a-80a), (B)(5) (*id.*, 80a-81a), and 1135.4 (*id.*, 113a-115a) in their challenge to the statutory scheme.

and potential viewpoint discrimination in a state-created private speech forum by impermissibly favoring the expression of certain views on special license plates.

The discrimination first manifested itself by the wholesale exclusion from the forum of any view not expressly authorized by the state. A statutory amendment enacted after petitioners commenced this lawsuit ostensibly opened the forum to the expression of all views – but only by subjecting certain views (*i.e.*, those not shared by the state) to more stringent and unreasonable access restrictions than those views shared by the state.

To remedy the resulting constitutional infirmities, petitioners seek a declaration that the scheme is unconstitutional and to enjoin its further enforcement. Petitioners alternatively seek to enjoin the specific provisions of the scheme authorizing the expression of a particular view – one that petitioners do not share – about women's reproductive options. This injunctive relief is necessary to level the playing field and place all viewpoints on equal footing in the forum pending the enactment of a constitutional scheme.

The district court dismissed petitioners' claims for lack of jurisdiction under the Tax Injunction Act, and the court of appeals affirmed. Both decisions resulted from erroneous understandings as to the nature of the payments made for special license plates and the scope of the Tax Injunction Act's jurisdictional bar. The consequence was to deny petitioners the judicial review by the lower courts to which they are entitled for violations of rights secured by the First and Fourteenth Amendments to the United States Constitution.

A. The Viewpoint Discriminatory State Law Underlying Petitioners' Federal Claims

All Oklahoma motorists must register their vehicles with the Oklahoma Tax Commission (the "OTC") before taking to

the roads. *See* 47 Okla. Stat. § 1113. As part of this process, motorists are required to pay "registration fees" ranging from $21 to $87 to the OTC. *See* §§ 1132; 1132.1; 1132.4; 1132.5. The OTC, in exchange, assigns unique identifying information to each motorist's vehicle and issues to each motorist a standard license plate displaying that information. *See* § 1113. A standard license plate can be revoked, cancelled, and repossessed at any time and thus is the property of the state. *See* § 1106. Motorists may not alter the content of a standard plate. § 1151(A)(3). Motorists are subject to criminal penalties for failure to affix their state-issued unaltered standard license plates to their vehicles' rear bumpers. §§ 1113(A)(2); 1151(A).

Oklahoma nevertheless permits its motorists to purchase from the OTC "special" license plates to be affixed to their vehicles in lieu of standard license plates. Special license plates substantially differ in appearance from standard license plates. The most obvious and significant difference is that special license plates display – in addition to the unique identifying information displayed on standard license plates – words, numbers, colors, designs and illustrations constituting self-expression. The self-expression displayed on special license plates neither facilitates the identification of motor vehicles nor assists the state and its employees and agents in performing safety, traffic and law enforcement functions.

Those Oklahoma motorists who choose to purchase a special license plate are required to pay a price of $8, $15 or $35 above the "registration fees" necessary to obtain a standard license plate.[3] At least $8 of the purchase price must be deposited into the Oklahoma Tax Commission Reimbursement Fund "to be used for the administration of the [Oklahoma Vehicle License

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[3] §§ 1135.1(B)(1) (App. E, 76a); 1135.1(B)(2)(f) (*id.*, 79a); 1135.1(B)(4) (*id.*, 80a); 1135.1(B)(6) (*id.*, 81a); 1135.1(B)(7) (*id.*, 81a); 1135.2(C) (*id.*, 101a); 1135.3(C) (*id.*, 113a); 1135.5(C) (*id.*, 134a); 1135.6 (*id.*, 135a-136a); 1135.7(C) (*id.*, 137a); 1135.7(D) (*id.*, 137a-138a).

and Registration Act, 47 Okla. Stat. §§ 1101 *et seq.*]."[4] Any remainder is typically: *(a)* given directly to various private entities that support the view displayed on the plate;[5] *(b)* deposited into specified state funds for subsequent distribution directly to private entities for purposes relating to the view displayed on the plate;[6] *(c)* deposited into specified state funds for subsequent distribution directly to government entities for purposes relating to the view displayed on the plate;[7] and/or *(d)* apportioned among Oklahoma municipalities, school districts, and various state funds.[8]

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[4] §§ 1135.1(D) (App. E, 82a); 1135.2(C) (*id.*, 101a); 1135.3(C) (*id.*, 113a); 1135.5(C)(2) (*id.*, 135a); 1135.6 (*id.*, 135a-136a); 1135.7(C) (*id.*, 137a); 1135.7(D) (*id.*, 137a-138a).

[5] *See, e.g.*, 47 Okla. Stat. §§ 1104.1(A)(1) (remainder paid directly to private or public colleges and universities) (App. F, 151a); 1135.5(B)(19) (remainder paid directly to Boy Scouts of America) (App. E, 126a); 1135.5(B)(25) (remainder paid directly to Lions Service Foundation) (*id.*, 128a).

[6] *See, e.g.*, 47 Okla. Stat. §§ 1104.5 (remainder deposited into Urban Forestry and Beautification Revolving Fund for distribution to non-profit organizations that develop and operate programs to encourage urban forestry and beautification) (App. F, 156a); 1104.10 (remainder deposited into Animal Friendly Revolving Fund for distribution to private veterinary clinics and non-profit animal shelters for spaying, neutering and shelter programs) (*id.*, 163a).

[7] *See, e.g.*, 47 Okla. Stat. §§ 1104.8 (remainder deposited into Color Oklahoma Revolving Fund to be expended by Department of Tourism and Recreation pursuant to contract with Oklahoma Native Plant Society for promoting wildlife heritage through education (*id.*, 161a); 1104.12 (remainder deposited into Oklahoma Quarter Horse Revolving Fund to be expended by Oklahoma Horse Racing Commission for support of any statewide organization dedicated to promoting American Quarter Horse breed) (*id.*, 165a).

[8] *See generally* 47 Okla. Stat. §§ 1104 (App. F, 141a-151a); 1135.3(C) (App. E, 113a); 1135.5(C) (*id.*, 134a-135a); 1135.7(D) (*id.*, 137a-138a).

When this lawsuit began, the statutory scheme authorized the OTC to make available for immediate purchase 110 different special license plates displaying particular views about various subjects. Each reflects one or more of the following four categories of self-expression: *(a)* support for a cause, idea or hobby; *(b)* support for an institution, entity or occupation; *(c)* membership in a particular group; and *(d)* vehicle usage. Two plates – one displaying the expression "choose life" (§ 1135.5(B)(22) (App. E, 127a)), and one displaying the expression "adoption creates families" (§ 1135.5(B)(23) (*id.*, 127a)) – allow Oklahoma motorists to express support for a "pro-life" view about women's reproductive options. All of the proceeds from sales of the so-called "Choose Life" special license plate must be disbursed by the state directly to certain private, non-profit organizations that also support a "pro-life" view about women's reproductive options. § 1104.6 (App. F, 156a-160a). Proceeds from sales of the so-called "Adoption Creates Families" special license plate are used to fund state adoption programs. § 1135.5(B)(22) (App. E, 127a).[9]

Nearly four years ago, petitioners sought passage of an amendment to the statutory scheme that would authorize for immediate purchase a special license plate expressing support for a "pro-choice" view about women's reproductive rights. A bill containing this amendment languished in the Oklahoma Senate Finance Committee until its official death in May 2004 (having failed passage during the first or second regular sessions after its introduction). App. B, 57a. No other bill was ever introduced authorizing for immediate purchase petitioners' desired special license plate. However, the Oklahoma legislature

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[9] Examples of other special license plates available today for immediate purchase include: 47 Okla. Stat. §§ 1135.3(B)(1) ("Round and Square Dance License Plates") (App. E, 103a); 1135.3(B)(3) ("National Rifle Association License Plates") (*id.*, 103a); 1135.3(B)(6) ("Balloonists License Plates") (*id.*, 104a); 1135.3(B)(24) ("Fellowship of Christian Athletes License Plates") (*id.*, 108a); 1135.3(B)(25) ("Parrothead Club License Plates") (*id.*, 109a).

and Governor have repeatedly amended the statutory scheme over the last four years to authorize for immediate purchase "new" special license plates (*i.e.*, ones not already codified in the scheme) expressing views about other subjects.

After petitioners filed this lawsuit, the Oklahoma legislature and Governor further amended the statutory scheme by adding §§ 1135.7 and 1135.8. The additional provisions authorize the sale of any "new" special license plate, but only after the OTC first receives 500 pre-paid applications for each plate. "Existing" special license plates (*i.e.*, those already codified in the scheme) are not subject to that requirement. The additional provisions also do not prohibit the Oklahoma legislature and Governor from authorizing "new" special license plates that are exempt from the 500 pre-paid applications requirement. § 1135.7(H) (App. E, 139a). In fact, following the addition of §§ 1135.7 and 1135.8, the statutory scheme has been further amended to include over 10 such plates.[10]

There remains no special license plate available for purchase by any Oklahoma motorist who would like to express a "pro-choice" view about women's reproductive options in this state-created private speech forum – notwithstanding that those motorists who wish to express a different view on the same subject are permitted to do so (as they have been for nearly five years).

B. The Decision of the District Court

Respondents moved in the district court to dismiss the First Amended Complaint in its entirety on various grounds. On August 16, 2005, the district court held *sua sponte* that federal

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[10] "New" special license plates recently authorized by the Oklahoma legislature that are exempt from the 500 pre-paid application requirement include: 47 Okla. Stat. §§ 1135.3(B)(33)-(35) & (37)-(40) (each expressing support for a particular fraternity or sorority) (App. E, 110a-112a); 1135.5(B)(34) ("Global War on Terrorism License Plate") (*id.*, 131a).

courts lack original jurisdiction under the Tax Injunction Act to hear petitioners' claims (Counts One through Four).[11] App. B, 71a.

The district court's dismissal of petitioners' claims resulted from three separate errors. *First*, the district court incorrectly concluded that any amount of money paid by a citizen to the state must be either a regulatory fee or a tax. *Id.*, 59a. *Second*, in applying this superficial dichotomy, the district court wrongly concluded that the amounts voluntarily paid by those Oklahoma motorists who choose to purchase special license plates are taxes. *Id.*, 63a. *Third*, the district court mistakenly concluded in a single footnote that *Hibbs v. Winn*, 542 U.S. 88 (2004), precluded a finding that petitioners' claims are outside the scope of the Tax Injunction Act. *Id.*, 58a-59a.

The district court began its consideration of petitioners' claims with the flawed understanding that it was required to "determine whether the extra amounts charged for specialty plates constitute taxes, for the purposes of the statute, or whether they are merely regulatory fees." *Id.*, 59a. This understanding apparently derived from the district court's reading of *Marcus v. Kansas Department of Revenue*, 170 F.3d 1305 (10th Cir. 1999), the authority setting forth the Tenth Circuit's test for distinguishing regulatory fees from taxes. However, *Marcus* does not hold – and the district court did not cite any authority

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[11] Plaintiff-appellant Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. challenges in Counts Five and Six of the First Amended Complaint the eligibility criteria embodied in 47 Okla. Stat. §§ 1104.6(C)(4) and 1104.6(D) (App. F, 158a-159a) for disbursements from proceeds of sales of the special license plate displaying the expression "choose life" because the challenged criteria condition state funding on abstention from privately-funded protected speech. The district court dismissed those claims for lack of jurisdiction under the Eleventh Amendment. App. B, 71a. The court of appeals reversed (App. A, 3a), and no defendant-appellee has petitioned for *certiorari* as to Counts Five and Six.

holding – that all payments to the state are necessarily either regulatory fees or taxes.

After restricting itself to this dichotomy, the district court correctly found that "the extra assessments for specialty license plates are paid only by a subset of license plate purchasers as would support the argument that the charges are imposed 'only upon those the scheme regulates' [*i.e.*, those motorists who wish to speak in the forum] and therefore constitute fees." App. B, 61a. The district court further correctly found that $8 of the extra amount paid for each special license is unquestionably "regulatory in nature." *Id.*, 63a. However, the district court held that these factors were outweighed in part by the fact that the purchase prices of special license plates are set by the legislature, as opposed to a regulatory body (App. B, 61a), and in part because any amount exceeding the $8 "regulatory" component of the purchase price was revenue used by the state for purposes "unrelated to the administration of motor vehicle . . . law" and for the "public benefit." *Id.*, 61a. Accordingly, the district court concluded that the total amount voluntarily paid for each special license plate is a tax because it lacks sufficient characteristics of regulatory fees.

In reaching this conclusion, the district court ignored several other key and indisputable facts: *(a)* that the only individuals who pay the amount charged for special license plates are those who voluntary choose to purchase them to express a particular view; *(b)* the purchase price for the overwhelming majority of special license plates is either $8 or $15 – and therefore either the state earns no revenue on those plates or the regulatory component of the purchase price exceeds the "revenue" component; *(c)* for special license plates that cost $35, the "revenue" component of the purchase price is essentially funneled directly from the state to private entities to fund activities consistent with the views expressed on those plates – and any "benefit" from such activities first inures to the motorists who purchased the plate for this reason; *(d)* the primary purpose

of the special license plate scheme is not to raise revenue, but rather to restrict access to a private speech forum; and *(e)* if, in fact, the primary purpose of the special license plate scheme were to raise revenue, its maximum revenue raising potential would not be compromised by making it more difficult – through viewpoint discrimination – for certain plates to be sold to a larger group of motorists.

Having wrongly determined that the amounts paid for special license plates are taxes (because they are not regulatory fees), the district court finally concluded that petitioners' claims did not fall within any "exception" to the Tax Injunction Act's jurisdictional bar. The only "exception" the district court looked to, however, was one it deemed to have been created by this Court's decision in *Hibbs v. Winn*. According to the district court, "[t]he *Hibbs* exception" provides that federal courts are not deprived of original jurisdiction over third-party claims (*i.e.*, claims asserted by plaintiffs who do not dispute their own state tax liabilities) **only** if "the suit's successes will enrich, and not deplete, the government entity's coffers." *Id.*, 58a-59a. The district court correctly found petitioners to be asserting third-party claims. It wrongly found, however, that "an injunction against the license plate program's operation would reduce state revenues[.]" *Id.* 59a. This finding was erroneous because enactment of a constitutional special license plate scheme (*i.e.*, one that is not viewpoint discriminatory) would create more revenue by opening the forum to the expression of more views by more motorists, thereby generating more sales.

Even if the district court were correct that petitioners' requested relief ultimately would cause the state to experience a reduction in revenues from special license plate sales, the district court should have considered petitioners' argument that their claims in any event were not subject to the Tax Injunction Act's jurisdictional bar. In refusing to do so, the district court ignored the comprehensive analysis in *Hibbs* of the Tax Injunction Act's legislative history – which reflects Congress's

intent solely to apply the Tax Injunction Act to claims asserted by taxpayers disputing the calculations of their own state tax liabilities – and further ignored that *Hibbs* nowhere purports to address the applicability of the Tax Injunction Act to situations where, as here, petitioners do not **directly** challenge a state tax credit, which was the claim presented by *Hibbs* (or even a state tax).

C. The Decision of the Court of Appeals

On March 6, 2007, the court of appeals affirmed the district court's dismissal of petitioners' claims under the Tax Injunction Act.[12] App. A, 3a. This decision widened an existing split among the circuit courts over the applicability of the Tax Injunction Act to substantially similar claims asserted by motorists across the country challenging virtually identical state special license plate schemes.

The court of appeals purported to reject wholesale the district court's understanding that any amount paid to a state necessarily must be either a regulatory fee or a tax; as Judge Gorsuch explained, "we do not for a moment doubt that the State can obtain funds through means other than 'taxes' and 'fees.'" *Id.*, 30a. Nevertheless, the court of appeals rejected the analysis underlying the Sixth Circuit's conclusion in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), *cert denied*, __ U.S. __, 126 S. Ct. 2972 (2006), that amounts paid for special license plates are neither regulatory fees nor taxes, but ordinary contractual debt. In so holding, the court of appeals essentially agreed with the district court's erroneous conclusion that the

[12] Before turning to its analysis of the Tax Injunction Act, the court of appeals held as an initial matter that petitioners' claims (and thus the appeal of their dismissal) were not mooted by the addition of §§ 1135.7 and 1135.8 to the statutory scheme because – even as amended – the scheme imposes "a non-trivial and arguably discriminatory burden" on the expression of certain viewpoints. App. A, 11a-12a (noting that "a difference arguably preferring one competing viewpoint over another remains embedded in Oklahoma law").

total amount paid for each special license plate must be a tax because it is not a regulatory fee. The court of appeals also agreed with the district court's erroneous conclusion that petitioners' claims are among those that Congress intended to bar from original federal jurisdiction by the Tax Injunction Act.

The court of appeals' analysis first looked to dictionary definitions of the term "tax" (taken from the early twentieth century through today) to support the erroneous holding that any amount set and collected by the state must be a tax if it generates revenue. *See id.*, 13a-16a. For example, quoting from one of several similar definitions, the court of appeals observed: "[Oklahoma] plainly imposes a charge for a thing. And through its statutory [special license plate] regime, the Oklahoma Legislature generates and distributes funds for a wide variety of public purposes." *Id.*, 13a. This observation fails to recognize, however, that every seller "imposes" a "charge" for any "thing" that is voluntarily purchased by a buyer. In holding that any revenue earned by the state – that is, any amounts collected in excess of the state's costs of providing a "thing" (or, here, a special license plate) – constitutes a tax, the court of appeals effectively applied the same regulatory fee-tax dichotomy with which it so strongly claimed to disagree.

The same contradiction is evidenced by the court of appeals' lengthy discussion of, and reliance on, both Judge Cooley's test for "distinguish[ing] between taxes and fees and even how to categorize assessments that appear to have characteristics of both" (*id.*, 14a), and "[Tenth Circuit] precedent in *Marcus*" (*id.*, 18a). The court of appeals' conclusion that (as between a regulatory fee and a tax) the amounts paid for special license plates are more characteristic of taxes is just as flawed as the district court's analysis in this regard. The court of appeals' supposition "that the primary purpose of the special license plate scheme is revenue rather than regulation" (*id.*, 15a) is unsupported and completely disregards that the scheme would not generate any revenue at all did it not have as its primary

purpose the creation of a private speech forum.[13] Indeed, the court of appeals – like the district court – does not provide any rationalization why the state would choose to make it more difficult for certain motorists (*i.e.*, those with whose view the state disagrees) to purchase special license plates than others if the scheme's main objection were to generate as much revenue as possible.

The court of appeals next considered the Sixth Circuit's decision in *Bredesen* that the amounts paid by motorists to the state for Tennessee's special license plates are neither regulatory fees nor taxes, but contractual debts reflecting ordinary purchases by motorists from the state. Judge Gorsuch initially expressed the panel's "reluctance to decide . . . with finality" whether it agreed with the Sixth Circuit's analysis. *Id.*, 29a. Although this "reluctance" stemmed from the panel's view that the argument had not been timely presented on appeal, the record is replete with evidence that the argument was properly before the court of appeals. For example: *(a)* petitioners consistently argued that the Tax Injunction Act did not apply because the purchase prices of special license plates are not taxes; *(b)* assuming the district court's regulatory fee-tax dichotomy were affirmed, petitioners were compelled to argue in their opening appellate briefs that, if properly subject to the dichotomy imposed by the district court's decision, the purchase prices are more characteristic of regulatory fees than taxes; *(c)* petitioners timely submitted a Fed. R. App. P. 28(j) submission apprising the court of appeals that the Sixth Circuit's *Bredesen* decision addressed the same outcome-determinative legal issue presented

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[13] The court of appeals' observation that the regulatory fee-tax dichotomy has been applied for purposes of determining whether an amount paid to the state violates Article I of the United States Constitution – and hence "that taxes **under State law** can include many assessments that may not be taxes for purposes of **federal** law" (App. A, 21a (emphasis in original)) – is of no consequence. None of the cases cited in this discussion apply the dichotomy in the context of the Tax Injunction Act, the only context relevant here.

in this appeal as applied to virtually identical facts; *(d)* petitioners discussed the Sixth Circuit's analysis in their appellate reply brief; and *(e)* petitioners, like respondents, were extensively (and almost exclusively) questioned by the court of appeals during oral argument about the Sixth Circuit's analysis.[14]

Moreover, the panel's reluctance to "decide with finality" whether amounts paid for special license plates are, as the Sixth Circuit held, ordinary contractual debts (and not taxes), is belied by its ensuing eight-page comprehensive analysis and rejection of that precise argument. *Id.*, 29a-33a. That discussion at the very least implicitly directed all Oklahoma district courts to reject the Sixth Circuit's analysis.

The panel's discussion of the Sixth Circuit's analysis began with the acknowledgement that:

> [Special license plate charges are] for a discretionary product that the state is offering, and it is purely up to the consumer to decide whether to buy it. The extra words on the specialty plate are not necessary to exercise the privilege regulated by the state – *i.e.*, driving. The basic [] charge covers the privilege of driving, and the incremental cost may simply be a commercial price paid by a willing motorist to purchase a license plate with a slogan that is pleasing to the motorist.

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[14] Even if the court of appeals were correct about the timeliness of this argument, exercise of the panel's discretion to consider it was plainly warranted. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."); *Hormel v. Helvering*, 312 U.S. 552, 557 (U.S. 1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.").

Id., 32a. Instead of converting this logical and accurate acknowledgment into a factual finding, the court of appeals refused to hold that amounts paid for special license plates are not taxes because they are ordinary contractual debts as between a willing buyer and seller.

The refusal to reach this holding was premised on the court of appeals' turning a blind eye to two realities of the marketplace. *First*, Judge Gorsuch opined that a motorist who voluntarily purchases a "a fancier car" can be said to incur voluntarily the accompanying luxury tax. He concluded from this opinion that a motorist who voluntarily purchases a special license plate similarly can be said to incur voluntarily the special license plate charge – and therefore that the voluntariness of a purchase is not dispositive of whether the payment made for a special license plate is or is not a tax. *Id.* Of course, this analogy ignores that the purchase price a motorist pays to the dealership is indisputably not a tax. In the case of special license plates, that the seller is – and thus that the purchase price is paid to – the state rather than a private entity does not transform the total payment into a tax. *Second*, the state's position as a monopoly seller of special license plates similarly does not somehow transform the otherwise "ordinary purchase" of a special license plate into payment of a tax. *Id.*, 30a-32a. The fact that customers may not always have a choice of suppliers from which to buy a commodity – and thus may not be able to drive the price of that commodity down – does not change the voluntary nature of the decisions to purchase these items regardless of price.

The court of appeals finally considered whether – irrespective of its holding that amounts paid for special license plates are taxes – petitioners' claims are among those Congress intended to be barred by the Tax Injunction Act. The conclusion that such claims are barred is the second of two outcome-determinative errors in the court of appeals' analysis (the first being that payments for special license plates are taxes) and

reflects a misapprehension of petitioners' argument. The court of appeals construed petitioners' argument to be only that this Court previously instructed that any and all third-party claims – regardless of their nature – are not subject to the Tax Injunction Act's jurisdictional bar. As the panel described:

> Motorists contest the application of [Tax Injunction Act] on the ground that they are not seeking to challenge an assessment imposed on them, but rather assessments imposed on and paid by other persons or entities. This, they argue, is an essential and dispositive distinction under the Supreme Court's teaching in *Hibbs v. Winn*.

Id., 23a-24a. To be sure, petitioners argued that the Court's analysis in *Hibbs* of the Tax Injunction Act's legislative history demonstrates an intent to bar only claims asserted by taxpayers challenging their own state tax liabilities. Yet petitioners also argued – and the court of appeals overlooked – that *Hibbs* does not preclude a finding that petitioners' claims in this case are not barred by the Tax Injunction Act, because Hibbs involved a third-party's direct challenge to a state tax credit. Such a challenge differs both in degree and kind from claims that (as here) would exist even if no taxes were in any way implicated by the underlying claims or requested relief.

REASONS FOR GRANTING THE PETITION

Three independent reasons demonstrate a pressing need for this Court's action and, whether considered individually or collectively, provide a basis for granting the petition.

First, the decision of the court of appeals in this case directly conflicts with the decision of the United States Court of Appeals for the Sixth Circuit in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), *cert denied*, __ U.S. __, 126 S. Ct. 2972 (2006) – as well as the view of eight vigorously dissenting Fifth Circuit judges in the denial of rehearing *en banc*

in *Henderson v. Stalder*, 434 F.3d 352 (5th Cir. 2005), *cert. denied sub nom*; *Keeler v. Stalder*, __ U.S. __, 126 S. Ct. 2967 (2006) – that virtually identical challenges to state special license plate schemes (in Tennessee and Louisiana, respectively) were not barred by the Tax Injunction Act.[15] The court of appeals' decision also implicitly conflicts with the decision of three other circuit courts to address the merits of such challenges (including a challenge where plaintiffs alleged that the scheme impermissibly discriminated against the expression of a "pro-life" view about women's reproductive options) without questioning their jurisdiction to do so under the Tax Injunction Act. Moreover, that special license plates displaying the expression "choose life" are available for purchase in at least fifteen other states, coupled with pending legislation to make "choose life" plates available for purchase in at least eleven more states, leaves little question that the circuit split is poised to deepen without this Court's immediate guidance.

Second, the court of appeals' decision is at odds with this Court's interpretation of the Tax Injunction Act in *Hibbs v. Winn*, 542 U.S. 88 (2004). This case, like *Hibbs*, involves third-party claims asserted by petitioners who do not dispute their own state tax liabilities. *Hibbs* presented the Court with the first-impression question of whether the Tax Injunction Act bars such petitioners from asserting direct challenges to state tax credits. Although this case presents the Court with a different first-impression question – whether the Tax Injunction Act bars third-party petitioners from asserting claims that do not involve direct

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[15] *See also Women's Resource Network v. Gourley*, 305 F. Supp.2d 1145, 1153-54 (E.D. Cal. 2004) (Tax Injunction Act did not bar challenge seeking to enjoin California special license plate scheme for impermissibly discriminating against "pro-life" view, *no appeal taken*); *but see NARAL Pro-Choice Ohio v. Taft*, 2005 U.S. Dist. LEXIS 21394, No. 1:05-CV-1064 (N.D. Ohio Sept. 27, 2005) (Tax Injunction Act barred challenge seeking to enjoin Ohio special license plate scheme for impermissibly discriminating against "pro-choice" view), *appeal voluntarily dismissed*, No. 1:05-cv-0164 (6th Cir. Sept. 18, 2006).

challenges to any aspect of the state's tax system – the Court's comprehensive analysis in *Hibbs* of the Tax Injunction Act's legislative history leaves no doubt that Congress did not intend to exclude such claims from original federal jurisdiction.

Third, the decisions below present important questions of first impression in this Court concerning *(1)* whether the amount paid for a special license plate is or is not a tax under the Tax Injunction Act, and *(2)* whether, even if such amounts constitute taxes for this purpose, the Tax Injunction Act bars claims that do not challenge either the calculation of any tax liability or the validity of any particular tax. In answering both questions affirmatively, the lower courts applied the Tax Injunction Act in a sweeping manner that not only insulates from original federal jurisdiction petitioners' claims and unconstitutional special license plate schemes generally, but also provides state legislatures with a roadmap for similarly insulating **any** private speech forum. *Certiorari* should be granted to prevent future use of the Tax Injunction Act to shield unconstitutional action by state officials from the judicial review to which it properly is subject before reaching this Court – that of the federal district and circuit courts.

I. The Circuit Courts Are Split Over Whether The Purchase Price Of A Special License Plate Is Or Is Not A Tax.

The court of appeals' holding that the amounts paid by motorists for special license plates are taxes, while comporting with the Fifth Circuit's holding in *Henderson*, squarely conflicts with the Sixth Circuit's decision in *Bredesen* (as well as the views of eight vigorously dissenting judges from denial of rehearing *en banc* in *Henderson*) that the Tax Injunction Act does not deprive federal district courts of jurisdiction over a challenge to a viewpoint discriminatory special license plate scheme because the amount paid by motorists who choose to purchase special license plates is **not** a tax.

The Sixth Circuit expressly rejected the regulatory fee-tax dichotomy adopted in *Henderson* and, for all intents and purposes, applied by the court of appeals in this case. As the Sixth Circuit explained, "[t]he test for determining which compelled exactions are taxes and which are fees cannot logically be used to determine whether a payment is a compelled exaction in the first place." *Bredesen*, 441 F.3d at 375. For this reason, the Sixth Circuit expressed its "substantial agreement" with the dissenting eight Fifth Circuit judges who believed that *Henderson* should be reheard *en banc*:

> "[T]he relevant question is whether this charge is a tax and if the answer to this question is no, the [Tax Injunction Act] does not apply regardless of whether the charge is characterized as a regulatory fee, a charitable donation or something else." Thus, even though the Fifth Circuit dissent found the charge for the Louisiana "Choose Life" plate not to be a regulatory fee, the charge was not a tax either, in part because "the charge is not 'imposed' by the legislature; because it is entirely optional and voluntary on the part of the Louisiana citizens electing to pay the extra charge for the specialty plate."

Bredesen, 441 F.3d at 375 (quoting *Henderson*, 434 F.3d at 354-55 (Davis, J., dissenting)).[16]

The Sixth Circuit instead began its analysis by looking to this Court's discussion of the "long-standing distinction . . . between taxes and ordinary debts" as set forth in *New Jersey v. Anderson*, 203 U.S. 483 (1906), *Florida C. & P. R. Co. v.*

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[16] *See Women's Resource Network*, 305 F. Supp.2d at 1153-54 (finding that amounts paid for California special license plates are not taxes because they "are imposed only on motorists who voluntarily" purchase the plates to provide financial and express other expressing other support for cause displayed on plates).

Reynolds, 183 U.S. 471 (1902), *Patton v. Brady*, 184 U.S. 608 (1902) and *Meriwether v. Garrett*, 102 U.S. 472 (1880), and their progeny. One such case was a Fifth Circuit decision – a case curiously ignored in *Henderson* – that applied this Court's "definition of tax in *Anderson* to hold that a challenge to the state's collection of lease rental payments was not subject to the Tax Injunction Act" because "[t]he lease obligations are a creature of contract, not a mandatory obligation imposed by the state as taxes are." *Bredesen*, 441 F.3d at 374 (citing *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 500 n.13, *reh'g denied*, 277 F.3d 1375 (5th Cir. 2001)). The Sixth Circuit elaborated:

> The [*Lipscomb*] analysis would apply *a fortiori* to ordinary purchases, like the purchase of government bonds, or the purchase of a souvenir at a state park gift store. Such purchase payments can hardly be termed "taxes" as opposed to ordinary payments on voluntary contracts. This conclusion follows, moreover, regardless of what the government does with the sales income.
>
> In this case, Tennessee's sale of specialty plates creates contractual debts to pay but imposes no tax. Instead of using its sovereign power to coerce sales, Tennessee induces willing purchases as would any ordinary market participant. The government confers all the same driving privileges on people who forgo specialty plates to buy standard-issue plates. Drivers' only motive for buying such plates, therefore, must rest with the attractiveness of the "Choose Life" message as Tennessee has marketed it, not a desire to obey Tennessee's will. Under *Anderson* and *Lipscomb*, these sales constitute regular contractual payments, not taxes.

Id.; *see also id.* at 373 (explaining that payments for special license plates "are most closely analogous to payments for

simple purchases from the government" that "are not taxes under the [Tax Injunction Act]").

For these reasons, the Sixth Circuit concluded that "[u]nder the Supreme Court's basic definition of a tax, logically applied in *Lipscomb*, the [Tax Injunction Act] does not preclude federal jurisdiction over the plaintiffs' claims in this case." *Id.* at 375. The contrary opinions of the Fifth and Tenth Circuits thus present an unusually sharp conflict on an important question of federal jurisdiction over claims presenting equally important constitutional questions that involve freedom of speech.

The court of appeals' decision in this case also implicitly conflicts with the decisions of three other circuit courts (the Fourth, Seventh, and Eleventh Circuits) to consider challenges involving special license plate schemes without first questioning – either in response to the parties' arguments or *sua sponte* – their jurisdiction to do so under the Tax Injunction Act.

Two of those decisions – *Planned Parenthood v. Rose*, 361 F.3d 786, *reh'g denied*, 373 F.3d 580 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005), and *Women's Emergency Network v. Bush*, 323 F.3d 937, *reh'g denied*, 67 Fed. Appx. 591 (11th Cir. 2003) – were issued prior to the Fifth Circuit's decision in *Henderson* and the Sixth Circuit's decision in *Bredesen*. In *Rose*, the Fourth Circuit affirmed that South Carolina's special license plate scheme was viewpoint discriminatory and upheld an injunction against further enforcement of a statute authorizing the sale of "choose life" special license plates – even though both the original and *en banc* panels clearly understood that doing so would (at least temporarily) result in loss of revenue to the state. *See* 361 F.3d at 788 (noting that "[s]ale of the Choose Life plate is expected to generate additional revenue for the State; the fee for the special plate is seventy dollars every two years in addition to the regular fee"). In *Women's Emergency Network*, the Eleventh Circuit did not reach the merits of plaintiffs' challenge to Florida's special license plate scheme because jurisdiction was lacking – but only because the plaintiffs

lacked standing to seek an injunction against further enforcement of a Florida statute authorizing the sale of "Choose Life License Plates" for an additional $20 payment.

The third case, *Choose Life Illinois, Inc. v. White*, 2007 U.S. Dist. LEXIS, No. 04-C-4316 (N.D. Ill. Jan 19, 2007) (unpublished memorandum opinion and order), is pending in the Seventh Circuit on appeal from a district court decision that was issued after both the Fifth Circuit's denial of rehearing *en banc* in *Henderson* and the Sixth Circuit's decision in *Bredesen*. In *Choose Life Illinois*, the plaintiffs alleged that the state's refusal to sell "choose life" license plates was the result of viewpoint discrimination, and the requested relief included an injunction against further enforcement of the scheme. The district court granted plaintiffs' summary judgment motion without any discussion of the Tax Injunction Act. Although appellate briefing was completed on August 24, 2007 (nearly six months after the court of appeals issued its decision in this case), and although an issue on appeal is whether the district court erred in denying defendants' motion for summary judgment on plaintiffs' claim that the Illinois scheme was facially unconstitutional (and thus should be enjoined in its entirety), the parties have not raised the Tax Injunction Act as an issue on appeal.

The Seventh Circuit's decision in *Choose Life Illinois*, whether addressing the underlying challenge without mention of the Tax Injunction Act or not, is certain to widen the existing circuit split. And the split is likely to be widened even further based on the work of Choose Life, Inc., a private non-profit organization actively lobbying for the sale in all fifty states of special license plates displaying the expression "choose life."[17] As a result of those efforts, "choose life" plates are also available for purchase in: Alabama, Arkansas, Connecticut, Georgia, Hawaii, Indiana, Kentucky, Maryland, Mississippi, Montana,

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[17] *See generally* Choose Life License Tag Web Site, http://www.choose-life.org (last visited Aug. 29, 2007).

New Jersey, New York, Pennsylvania, and South Dakota. Efforts are also under way to make such plates available for purchase in: Colorado, Delaware, Iowa, Massachusetts, Michigan, Nevada, New Hampshire, North Carolina, North Dakota, Virginia, and Washington.[18] If history is any indication, it is only a matter of time before the district courts in these states are presented with the same issue giving rise to the circuit split in the first instance: whether challenges to viewpoint discriminatory special license plate schemes are barred by the Tax Injunction Act.

The Court's immediate review is therefore necessary to resolve the growing circuit split on this threshold jurisdictional issue and ensure that motorists across the country – whether they seek to express a "pro-life" or a "pro-choice" view about women's reproductive options – have a federal forum in which to raise challenges to state special license plate schemes.[19]

II. The Circuit Courts Are Wrongly Interpreting The Tax Injunction Act's Legislative History And Misapplying *Hibbs v. Winn*, 542 U.S. 88 (2004).

Both the court of appeals and the Fifth Circuit in *Henderson* held that the Tax Injunction Act strips federal courts of original jurisdiction over any and all third-party claims (*i.e.*, claims asserted by plaintiffs who do not challenge the calculation of their own state tax liabilities) if the requested relief would involve a net revenue loss to the state. The Sixth Circuit, in contrast, did not have to reach this question after holding that

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[18] *See* Choose Life Newsletter (Choose Life, Inc., Ocala, Fla.), Aug. 17, 2007, http://www.choose-life.org/newsletter.html.

[19] *See* Brianne J. Good, Comment, *Limiting the Federal Forum: The Dangers of an Expansive Interpretation of the Tax Injunction Act*, 115 Yale L.J. 727, 733 (Dec. 2005) (citing *Heck v. Humphrey*, 512 U.S. 477, 500 (1994) (Souter, J., concurring) (observing that there must be some federal forum available in which individuals can sue state officials)).

the amounts paid for special license plates are not taxes. Nevertheless, the Sixth Circuit expressed skepticism that the Tax Injunction Act would apply in any event to a challenge to a viewpoint discriminatory special license plate scheme.

> In *Hibbs*, the Supreme Court . . . explained that "in enacting the [Tax Injunction Act], Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." The Court also noted that cases applying the [Tax Injunction Act] generally "involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes)." Plaintiffs in this case are of course not seeking to avoid paying for a "Choose Life" license plate, and it is therefore at least questionable whether the [Act] would apply even if the payment for the license plates were a "tax."

Bredesen, 441 F.3d at 373, n.12 (quoting *Hibbs*, 542 U.S. at 104-106). In fact, the legislative history and this Court's jurisprudence leave no room for debate: petitioners' challenge was never intended by Congress to be subject to the Tax Injunction Act's jurisdictional bar.

The Senate and House Reports supporting enactment of the Tax Injunction Act reflect that it was intended to apply exclusively to challenges to taxpayers' own state tax liabilities (and not to **any** challenges brought by third-parties). *See* S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937); H. Rep. No. 1503, 75th Cong., 1st Sess. 2 (1937); 81 Cong. Rec. 1416 (1937). All of the examples provided in these legislative materials to justify the jurisdictional bar involve plaintiffs withholding from state tax authorities payments of their own disputed tax liabilities pending resolution of the disputes in federal court. By doing so, those plaintiffs refused to avail themselves of pre-existing state procedures designed to resolve issues about the propriety

of state tax calculations – after payment was first made to the state. Congress was concerned that allowing plaintiffs – and specifically, foreign corporations doing business in a state – to bypass state "protest" procedures in this manner would result in plaintiffs withholding "taxes in such vast amounts and for such long periods as to seriously disrupt State and county finances." *Id.*

Accordingly, Justice Ginsburg acknowledged throughout the majority opinion in *Hibbs* that Congress intended to bar from lower federal court review only taxpayers' challenges to the calculation of their own state tax liabilities. As she explained:

> In short, in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration.

Hibbs, 542 U.S. at 104; *see, e.g., id.* at 104 ("In . . . 28 U.S.C. § 1341, Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections. Third-party suits not seeking to stop the collection (or contest the validity) of a tax **imposed on plaintiffs** . . . were outside Congress' purview.") (emphasis in original); *id.* at 104-105. *Id.* at 107 ("[The Court] has interpreted and applied the TIA only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes."); *id.* at 109 ("Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of particular taxes **imposed on them**") (emphasis in original) (internal quotation omitted).

Here, there is no disputed liability for petitioners first to pay to the state and then to seek recovery; no "pro-choice" plate is available for motorists to purchase. And even if such a plate were available, petitioners do not dispute the state's ability to charge motorists for special license plates and would not be seeking a refund of that charge. While the court of appeals, like the Fifth Circuit in *Henderson*, deemed it appropriate to ignore this legislative history and the striking differences between petitioners' claims and those Congress was concerned about removing from lower federal court review, it is for this Court to ensure that courts are constrained to apply federal statutes consistent with legislative intent.

To further support their conclusion that petitioners' claims are barred by the Tax Injunction Act, the court of appeals and the Fifth Circuit each read this Court's decision in *Hibbs* as precluding any alternative holding. But their reading grossly expands the holding in *Hibbs* to facts that were not before the Court. *Hibbs* presented this Court with the first-impression question of whether a third-party's direct challenge to a state tax credit was barred by the Tax Injunction Act. *Hibbs* nowhere purports to have analyzed the applicability of the Tax Injunction Act to all types of third-party challenges. While *Hibbs* might be viewed as instructive in considering whether the Tax Injunction Act bars a third-party's direct challenge to a state tax, there is no indication that in *Hibbs* this Court foreclosed a finding that the Tax Injunction Act is not a jurisdictional bar to claims that, like petitioners' claims in this case, would exist even if no money ever changed hands between plaintiffs and the state.

III. The Court of Appeals' Decision Presents Important Questions With Implications Beyond Special License Plate Schemes.

Whether the amounts paid for special license plates are taxes for purposes of the Tax Injunction Act, and whether claims challenging viewpoint discriminatory special license plate

schemes are subject to the Tax Injunction Act's jurisdictional bar, are important questions for a variety of reasons.

Affirmative answers to both questions have already deprived motorists in at least three states of a federal forum to hear the very same claims that federal district and circuit courts have addressed on the merits when raised by motorists in at least three other states. Similar incongruities surely will result from the existing and growing number of federal lawsuits involving special license plate schemes – lawsuits generated in large part by the coordinated efforts of a private organization seeking to make "choose life" special license plates available for purchase by motorists in every state. Absent this Court's immediate guidance, motorists across the country will continue to be deprived of the federal forum to which they are entitled – and to which some similarly-situated motorists are granted access – for substantive resolution of important First and Fourteenth Amendment issues that are themselves the subject of a circuit split.[20]

But perhaps most importantly of all, the analysis underlying affirmative answers to both questions has far-reaching implications beyond the debate about women's reproductive rights and challenges to special license plate schemes. Simply put, the court of appeals' decision in this case, like the Fifth Circuit's decision in *Henderson* (and contrary to the Sixth Circuit's decision in *Bredesen*), has effectively transformed the

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[20] *Compare, e.g., Rose*, 361 F.3d at 789-92 (South Carolina's special license plate scheme impermissibly discriminated against private speech on basis of viewpoint); *Bredesen*, 441 F.3d at 375-380 (Tennessee's special license plate scheme reflects government speech); *but see Bredesen*, 441 F.3d at 380-92 (Martin, C.J., dissenting) (Tennessee's special license plate scheme impermissibly discriminated against private speech). *See also* Traci Daffer, Comment, *A License to Choose or a Plate-ful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. Rev. 869 (Spring 2007) (summarizing various substantive issues arising from "choose life" license plate litigation and conflicting judicial resolution of same).

Tax Injunction Act into something it was never meant to be: a means by which state legislatures can create viewpoint discriminatory private speech fora and immunize them from original federal jurisdiction. The following hypothetical illustrates the damaging impact of this transformation far beyond challenges to special license plate schemes.

Suppose that a state legislature enacted a statute specifying which views may be expressed in a public forum (*e.g.*, a park), and that support for the continued presence of U.S. troops in Iraq is one such view. Suppose further that none of those specified views could be expressed unless a willing speaker first made a $35 payment to the state. Also suppose that the state was required to use $8 of that payment to cover the cost of administering the statute (*e.g.*, for security and clean-up), but that the remaining $27 must be distributed by the state to private non-profit organizations for use only in activities publicizing the monetary and other benefits provided to those who join the State National Guard. Additionally, suppose that a group of plaintiffs – each of whom wished to pay $35 to the state for the purpose of expressing in the park their support for immediate U.S. withdrawal from Iraq – challenged the statute in federal district court for creating actual and potential viewpoint discrimination in a speech forum by impermissibly favoring the expression of certain views. And suppose finally that plaintiffs' requested relief was an injunction against the statute's further enforcement in order to level the playing field for the expression of views in park.

The court of appeals' decision, like the Fifth Circuit's decision in *Henderson*, would compel the district court in this hypothetical to invoke the Tax Injunction Act's jurisdictional bar and dismiss the plaintiffs' claims without addressing the merits. More specifically, the court of appeals' decision would compel the conclusion that the $35 payment is a tax, because that amount is "imposed" by the state legislature and generates revenue "from which the entire community benefits" by funding

"State initiatives" such as the "[State] National Guard." The court of appeals' decision also would compel the conclusion that, assuming the $35 payment is a tax, Congress intended for plaintiffs' claims to be barred by the Tax Injunction Act because an injunction against future enforcement of the challenged statute would prevent the state's continued collection of the $35 payment.

There can be no doubt that – but for the proliferation of special license plate litigation over the last few years, the majority of which arose because motorists wish to express on their license plates particular views about women's reproductive rights – federal district courts would not have hesitated to exercise original jurisdiction to decide the merits of the important First and Fourteenth Amendment issues underlying plaintiffs' claims in this hypothetical. The court of appeals' decision in this case, like the Fifth Circuit's decision in *Henderson*, represents an "aggressive run with the [Tax Injunction Act]" that "create[s] a side door for federal judges determined to avoid a constitutional question." *Henderson*, 434 F.3d at 357 (Higgonbotham, C.J. and Wiener, C.J., dissenting). This Court's review is necessary to close that door.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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